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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 MARIA LAZOS, et al,

13 Plaintiff,

14 vs.

15 CITY OF OXNARD, et al,

16 Defendants.

17 TOMAS BARRERA, SR.

18 Plaintiff,

19 vs.

20 CITY OF OXNARD, et al,

21 Defendants.

22 } Case No. CV 08-02987 RGK (SHx)

23 } PLAINTIFFS' OPPOSITION TO
24 } DEFENDANTS' MOTION IN LIMINE
25 } NO. 12 TO EXCLUDE WITNESS
26 } JOSEPHINE ESTRADA FROM
27 } OFFERING OPINIONS AS TO
28 } ULTIMATE ISSUES

29 Date: August 11, 2009

30 Time: 9:00 a.m.

31 Courtroom: 850

32 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

33 Plaintiffs, MARIA LAZOS and TOMAS BARRERA, SR., individually and
34 as representatives of the ESTATE OF TOMAS BARRERA, hereby file their
35 Opposition to Defendants' Motion in Limine No. 12, to exclude witness Josephine
36 Estrada from offering opinions as to ultimate issues.

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MEMORANDUM OF POINTS AND AUTHORITIES

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**PLAINTIFFS CANNOT BE ORDERED TO PRECLUDE TESTIMONY OF
A WITNESS WHO IS NOT UNDER PLAINTIFF'S CONTROL**

5 Josephine Estrada is an independent eye witness, over whom Plaintiffs or their
6 counsel have no control. Neither Plaintiffs or Defendants can, or are allowed, to
7 advise or direct Ms. Estrada as to what she should, or should not, testify about.
8 Neither party is allowed to talk to Ms. Estrada prior to her testimony. Therefore, this
9 motion should be denied, since if the Honorable Court grant the motion, it will be
10 impossible for Plaintiffs, Defendants or their counsel to enforce the Court order.

II.

**ANY OBJECTION TO MS. ESTRADA'S TESTIMONY IS WAIVED AS IT
WAS NOT TIMELY MADE DURING HER DEPOSITION**

Fed. R. of Ev. Rule 32(d)(3)(B) provides that,

“An objection to an error or irregularity at an oral examination is waived if:

- (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
- (ii) it is not timely made during the deposition.”

21 In this case, Ms. DeGenna, who represented Defendants at the time the
22 deposition of Ms. Estrada was taken, did not object to her referring to the incident as
23 "murder" and did not move to strike her answer. Therefore, pursuant to Fed. R. of
24 Ev. Rule 32(d)(3)(B), any objected to said testimony has been waived.

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26 | *W*

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III.

MS. ESTRADA'S TESTIMONY IS ADMISSIBLE

Fed. R. of Ev. Rule 701 provides that a witness' testimony in the form of opinions or inferences is appropriate provided it is limited to those opinions or inferences which are rationally based on the perception of the witness. As a percipient witness, Ms. Estrada can offer her opinions and inferences.

8 The rule prohibiting testimony concerning ultimate issues has been abolished,
9 and Fed. R. of Ev. Rule 704(a) provides that “testimony in the form of an opinion or
10 inference otherwise admissible is not objectionable because it embraces an ultimate
11 issue to be decided by the trier of fact.” Under the Federal Rules of Evidence,
12 opinion testimony is admissible as long as the witness is competent to testify, that is,
13 as long as the witness has perceived the events upon which his opinion is based. The
14 opinion may embrace the ultimate issue to be decided by the trier of fact. *See U.S.*
15 v. Crawford, 239 F.3d 1086, 1090 (9th Cir., 2001) (lay witness may testify as to an
16 ultimate issue of fact, so long as the testimony is otherwise admissible); U.S. v. Allen,
17 10 F.3d 405, 414 (7th Cir., 1993) (it is no longer a valid objection that witness is
18 offering an opinion on an “ultimate issue”); Wade v. Haynes, 663 F.2d 778, 783
19 (C.A.Mo., 1981) (it is settled that testimony otherwise admissible is not inadmissible
20 because it embraces an ultimate issue to be decided by the trier of fact); U.S. v.
21 Miller, 600 F.2d 498, 500 (C.A.Miss., 1979) (Rule 704 of the Federal Rules of
22 Evidence clearly permits a witness to express an opinion on an ultimate issue to be
23 decided by the jury.)

24 It is proper for a lay witness, in relating his observations, to testify in terms
25 which include inferences and to state all relevant inferences, whether or not they
26 embrace ultimate issues to be decided by the trier of fact, unless the trial judge,
27 exercising judicial discretion, determines that drawing such inferences require special
28 skill or knowledge or would tend to mislead the jury. State v. Wigley 5 Wash.App.

1 465, 468 (Wash.App. 1971).

2 Ms. Estrada should be allowed to offer her opinions and inferences as to events
3 she witnessed.

4 Moreover, this is not a criminal case, and the jury will not be asked to decide
5 whether a murder had been committed. Therefore, whether or not Defendant Salinas
6 committed a "murder" is not an ultimate issue in this case.

7 **IV.**

8 **CONCLUSION**

9 Based on the foregoing, it is respectfully requested that the motion be denied.

10 Dated: July 16, 2009

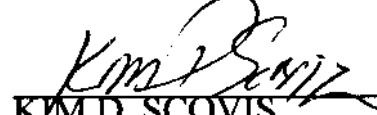
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13 GREGORY A. YATES
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16 Personal Representative of THE ESTATE OF
17 TOMAS BARRERA, JR.

18 Dated: July , 2009

19 **LAW OFFICES OF KIM D. SCOVIS**

20 
21 KIM D. SCOVIS
22 JENNY SCOVIS
23 Counsel for Plaintiff,
24 MARIA LAZOS, individually and as a Personal
25 Representative of THE ESTATE OF TOMAS
26 BARRERA, JR.